Bulyah bt Ishak & Anor (administrators for the estate of Nor Zainir bin Rahmat) v Ambank (M) Bhd (in liquidation) and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-638–04 OF 2016 AND B-02(NCVC)(W)-803–04 OF 2016

PRASAD ABRAHAM, ZAMANI A RAHIM AND ASMABI MOHAMAD JJCA

2 OCTOBER 2017

Land Law — Interest in property — Power of attorney — Deceased purchased property from developer — Deceased appointed as 'attorney' of property — Deceased's wife appointed as substitute attorney — Deceased's wife appointed as administrators of deceased's estate upon deceased's death and requested that title be registered in her name — Request refused by developer — Discovery that developer no longer owner of property and charged property to bank without administrator's consent/permission — Whether bank immediate holder and/or charger of property — Whether developer only bare trustee of property — Whether developer had right to charge property to bank

There were two appeals. The first appeal ('Appeal No 638') was an appeal by Bulyah bt Ishak and Noraini bt Abdullah ('the plaintiffs'), the administrators of the estate of Nor Zainir Rahmat ('the deceased') against the decision of the High Court judge ('HCJ') in dismissing the plaintiffs' claim against Ambank (M) Bhd ('the fourth defendant'). The second appeal ('Appeal No 803') was an appeal by He-Con Sdn Bhd ('the first defendant') against part of the decision of the HCJ in allowing the plaintiffs' claim against the first defendant, a declaration that the deceased was the beneficial owner of a property. Both appeals were consolidated. Pursuant to a sale and purchase agreement, the deceased agreed to purchase the property from the first defendant. By a power of attorney, the first defendant appointed and/or named the deceased the 'attorney' of the property. The deceased appointed the first plaintiff as the 'substitute attorney'. When the deceased died, the plaintiffs were appointed as administrators of the estate of the deceased. At the time the title of the property was to be issued, the first plaintiff requested that the title be registered in her name. However, the developer refused. The first plaintiff found out that the stamp duties and assessment bills for the property were too high and she could not afford to pay them. She postponed the idea to effect the transfer of the property to her name. The first plaintiff then obtained a High Court order to administer the property. She later discovered that the first defendant was no longer the owner of the property and had charged the property to the fourth

A defendant without the first plaintiff's permission and/or consent. The plaintiffs commenced an action to recover the property. The HCJ allowed the plaintiffs' claim against the first defendant but the plaintiffs' claim against the fourth defendant was dismissed. Hence the present appeals.

B **Held:**

(1) The findings of the HCJ were predicated on the evidence that was presented before him. All documents relevant to the case were still in the possession of the second and third defendants who were not called as witnesses for the first defendant. The HCJ had rightly invoked s 114(g) of the Evidence Act 1950 against the first defendant due to the non-calling of the second and third defendant in High Court as these defendants had personal knowledge of the matter and would be in a better position to provide the best evidence for the first defendant. The burden laid on the first defendant to call the second and third defendants to testify on its behalf (see paras 32–33).

(2) After having made the findings the full price for the said property had been paid, the first defendant stood in the position of a bare trustee to the deceased. As a bare trustee, the first defendant could not deal with the property or treat as if the property belongs to him. Furthermore, an irrevocable POA had been executed. The deceased had the sole right to deal with the property. Therefore, the transaction entered into by the first and fourth defendant were void ab initio. Notwithstanding the fact that the plaintiffs had not taken steps to lodge a caveat, it did not mean that the plaintiffs' rights and interest were vitiated, as in law, a caveat does not create interest or rights. The HCJ erred and misdirected his mind as to the law and fact when His Lordship ruled that the fourth defendant was a bona fide party and was not negligent in causing the charge over the property to be registered in its favour (see paras 43 & 45).

[Bahasa Malaysia summary

Terdapat dua rayuan. Rayuan pertama ('Rayuan No 638') adalah rayuan oleh Bulyah bt Ishak dan Noraini bt Abdullah ('plaintif-plaintif'), pentadbir-pentadbir harta pusaka Nor Zainir Rahmat ('si mati') terhadap keputusan hakim Mahkamah Tinggi ('HMT') dalam menolak tuntutan plaintif-plaintif terhadap Ambank (M) Bhd ('defendan keempat'). Rayuan kedua ('Rayuan No 803') adalah rayuan oleh He-Con Sdn Bhd ('defendan pertama') terhadap sebahagian keputusan HMT dalam menolak tuntutan plaintif-plaintif terhadap defendan pertama, satu deklarasi bahawa si mati adalah pemilik benefisial hartanah tersebut. Kedua-dua rayuan ini digabungkan. Berikutan satu perjanjian jual beli, si mati bersetuju membeli sebidang hartanah daripada defendan pertama. Melalui satu surat kuasa wakil, defendan pertama melantik dan/atau menamakan si mati 'wakil' hartanah tersebut. Si mati melantik plaintif pertama sebagai 'wakil ganti'. Apabila si mati

meninggal dunia, plaintif-plaintif dilantik sebagai pentadbir-pentadbir harta pusaka si mati. Pada masa hak milik hartanah tersebut hendak dikeluarkan, plaintif pertama memohon agar hak milik didaftarkan bawah namanya. Walau bagaimanapun, pemaju enggan. Plaintif pertama mendapati duti setem dan bil-bil penilaian bagi hartanah tersebut terlalu tinggi dan dia tidak mampu membayarnya. Dia menunda idea untuk menguatkuasakan hartanah tersebut bawah namanya. Plaintif pertama kemudian memperoleh satu perintah Mahkamah Tinggi untuk mentadbir hartanah tersebut. Dia mendapat tahu defendan pertama bukan lagi pemilik hartanah tersebut dan telah memajaknya pada defendan keempat tanpa kebenaran dan/atau kelulusan plaintif pertama. Plaintif-plaintif memulakan satu tindakan untuk mendapatkan semula hartanah tersebut. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif-plaintif terhadap defendan pertama tetapi tuntutan plaintif-plaintif terhadap defendan keempat ditolak. Oleh itu, rayuan ini difailkan.

Diputuskan:

(1) Dapatan-dapatan HMT dibuat berdasarkan keterangan di hadapan beliau. Kesemua dokumen relevan terhadap kes masih dalam milikan defendan kedua dan ketiga yang tidak dipanggil sebagai saksi-saksi defendan pertama. Hakim Mahkamah Tinggi telah, dengan betul, membangkitkan s 114(g) Akta Keterangan 1950 terhadap defendan pertama kerana tidak memanggil defendan kedua dan ketiga di Mahkamah Tinggi yang mempunyai pengetahuan peribadi tentang hal perkara tersebut dan berada dalam kedudukan yang lebih baik untuk memberi keterangan terbaik bagi defendan pertama. Beban terletak pada defendan pertama untuk memanggil defendan kedua dan ketiga bagi pihaknya untuk memberi keterangan (lihat perenggan 32–33).

(2) Selepas membuat dapatan bahawa harga penuh hartanah tersebut telah dibuat, defendan pertama berada dalam kedudukan sebagai pemegang amanah si mati. Sebagai pemegang amanah, defendan pertama tidak boleh berurusan dengan hartanah tersebut atau menganggapnya seperti hartanahnya sendiri. Tambahan lagi, surat kuasa wakil yang tidak boleh ditarik balik telah terlaksana. Si mati mempunyai hak tunggal untuk berurusan dengan hartanah tersebut. Oleh itu, transaksi yang dimasuki oleh defendan pertama dan keempat adalah terbatal ab initio. Tanpa mengira fakta bahawa plaintif-plaintif tidak mengambil langkah-langkah memasukkan kaveat, ini tidak bermakna hak-hak dan kepentingan-kepentingan plaintif-plaintif menjadi cacat, kerana di bawah undang-undang, satu kaveat tidak membentuk kepentingan-kepentingan atau hak-hak. Hakim Mahkamah Tinggi terkhilaf dan tersalah arah diri beliau tentang undang-undang dan fakta apabila beliau memutuskan bahawa defendan keempat adalah pihak yang bona fide dan tidak cuai dalam memajak hartanah tersebut berpihak padanya sendiri (lihat perenggan 43 & 45).]

Notes

For cases on interest in property in general, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3908–3910.

Cases referred to

Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 4 MLJ 651; [2010] 6 CLJ 530, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Kamarulzaman Omar & Ors v Yakub Husin & Ors [2014] 2 MLJ 768; [2014] 1 CLJ 897, FC (folld)
Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin [2003] 2 MLJ 97, CA (folld)
MBF Leasing Sdn Bhd v Eng Poh Hong [2004] 6 CLJ 473, HC (refd)
Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals [2004] 4 MLJ 105; [2004] 4 CLJ 282, CA (refd)
OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim [1999] 2 MLJ 511; [1999] 2 CLJ 949, CA (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (folld)
Tindok Besar Estate Sdn Bhd v Tinjar & Co [1979] 2 MLJ 229; [1979] 1 LNS 119, FC (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614; [1994] 3 CLJ 20, SC (refd)

Legislation referred to

Companies Act 1965
Evidence Act 1950 ss 91, 103, 114(g)
National Land Code s 340(2), (3)

Appeal from: Suit No 22-NCVC-307–04 of 2013 (High Court, Shah Alam)

Tan Chong Lii (Akberdin & Co) for the appellants.
Malcom Fernandez (Muhd Hadzwan and Mark Cheng with him) (C Sukumaran & Co) for the fourth respondent.
Harjinder Singh Sandhu (Ranjit Ooi & Robert Low) for the first respondent.

Asmabi Mohamad JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals fixed before us Appeal No B-02(NCVC)(W)-638–04 of 2016 ('Appeal No 638') is an appeal by the appellants, Bulyah bt Ishak and Noraini bt Abdullah, the administrators of the estate of Nor Zainir bin Rahmat (the first and second plaintiff/plaintiff against of the decision of the learned High Court judge of Shah Alam ('the learned

judge') dated 7 March 2016 made after a full trial, which dismissed the plaintiffs' claim against Ambank (M) Bhd ('the fourth defendant') with costs of RM15,000.

[2] Appeal No B-02(NCVC)(W)-803–04 of 2016 ('Appeal No 803') is an appeal by the appellant, He-Con Sdn Bhd ('the first defendant') against part of the decision of the learned judge which allowed the plaintiffs' claim against the appellant as per prayer (p) of the statement of claim, a declaration that the deceased was the beneficial owner of a 3½ storey shop lot at No 31, Jalan Tengku Ampuan Zabedah J9/J, Seksyen 9, 40100 Shah Alam, Selangor Darul Ehsan under Title No HDS 151345, Lot No PT 917 Mukim Bandar Shah Alam, Daerah Petaling, Selangor ('the property') with costs of RM15,000.

[3] Both Appeal No 638 and Appeal No 803 were consolidated vide an order of this court dated 31 May 2016. Parties had also informed the court that for the purpose of these two appeals they would be referring to the records of appeal as in Appeal No 638.

[4] We will refer to the parties as they were described in the High Court.

BRIEF BACKGROUND FACTS

[5] The plaintiffs are the joint administrators of the estate of Nor Zainir bin Rahmat, the deceased ('the deceased') who passed away on 26 June 2002. The first plaintiff is also the widow of the deceased.

[6] The first defendant, who is the appellant in Appeal No 803 is a company set up under the Companies Act 1965. The first defendant has since been wound up. The second and third defendants are directors of the first defendant. Both the second and third defendants are bankrupts.

[7] The fourth respondent ('the fourth defendant') is a licensed financial institution which registered address is at Level 22, Bangunan Ambank Group, Jalan Raja Chulan, 50200 Kuala Lumpur.

[8] Pursuant to a sale and purchase agreement dated 22 December 1997 ('the agreement'), the deceased agreed to purchase the property from the first defendant. The deceased paid the purchase price in full (see exhs P1 and P2 at pp 584–594 and 665–668 Vol 2(3) of the appeal record ('AR')).

[9] By a power of attorney dated 26 April 2002 which was registered in the High Court of Kuala Lumpur on 30 April 2002 under presentation No 29803/02, the first power of attorney (see exh P2 at pp 665–668 Vol 2(3)

of AR), the first defendant appointed and/or named the deceased the 'attorney' of the property. Paragraph 3, of the first power of attorney states that it is an irrevocable power of attorney.

[10] Pursuant to the power of attorney dated 21 May 2012, registered in the High Court of Kuala Lumpur on 19 July 2002 vide presentation No 18192/02, the second power of attorney (see exh P3 at pp 669–674 Vol 2(3) of AR), the deceased appointed the first plaintiff as the 'substitute attorney'.

[11] The deceased died on 26 June 2002. The letters of administration was issued on 9 November 2005 vide Petition No S7–31–280 of 2004. Both the plaintiffs were appointed as administrators of the estate of the deceased (see exh P5 at pp 606–609 Vol 2(3) of AR)).

[12] At the time the title of the said property was to be issued, the first plaintiff had requested that the title to be registered in her name. However, the developer refused to give its consent for direct transfer (see exhs P7, P8, P9, P10, P11 at pp 595–596, 597–598, 599, 600–601 and 602–603 Vol 2(3) of AR).

[13] The first plaintiff later found out the stamp duties and assessment bills for the said property were in the sum of RM110,355.60. The sum was too high, the first plaintiff could not afford to pay the stamp duties and the assessment as she had three small children to support. Due to financial constraint, the first plaintiff postponed the idea to effect the transfer of the property to her name.

[14] The first plaintiff obtained the order from the Kuala Lumpur High Court to administer the property vide vesting order dated 9 December 2008 (see exh P6 at pp 615–616 of Vol 2(3) of AR 2(3)).

[15] Towards the end of 2011, the first plaintiff discovered that the first defendant, who was no longer the owner of the property, having sold it to the deceased and received the full purchase price, had charged the property to the fourth defendant. This was done without the first plaintiff's permission and/or consent (see pp 468–501 Vol 2(2) of AR, pp 502–523 and 524–547 of Vol 2 of AR 2(3)). The first plaintiff then lodged two police reports, on 29 November 2011 vide Jalan Tun Razak Police Report No M8739/11 and on 30 July 2012 vide Dang Wangi Police Report No 029961/12 respectively (see exhs P16 and P16(a) at pp 632 and 642 Vol 2(3) of AR).

[16] On 10 January 2012, the first plaintiff lodged a private caveat over the property vide presentation No 1129/2012. However, the same was removed (see exh P7 at p 655 Vol 2(3) of AR).

[17] The first plaintiff through her solicitors demanded for an explanation from the fourth defendant pertaining to the charge vide a letter dated 9 August 2012 (see exh P18 at pp 643–644 Vol 2(3) of AR). The fourth defendant responded to the said letter by serving the first plaintiff with the cause papers pertaining to the action commenced by the fourth defendant, seeking for, amongst others, an order for sale of the property as the first defendant had breached the terms and conditions of the financing facilities. An order for sale was granted and the property was scheduled for auction on 8 April 2013. However, the plaintiffs filed this action to recover the property.

[18] After hearing two witnesses for the plaintiffs and one witness each from the first and fourth defendants respectively, the learned judge allowed the plaintiff's claim against the first defendant with cost of RM15,000. With respect to the plaintiffs' claim against the fourth defendant, the learned judge dismissed the plaintiffs' claim against the fourth defendant with costs of RM15,000. The learned judge further ordered the fourth defendant to proceed with the auction of the property to recover the amount due to it and if there is any surplus from the sale, the said sum shall be paid to the plaintiffs.

[19] The plaintiffs appeal against the learned judge's order in dismissing their claim against the fourth defendant. The first defendant on the other hand appeals against the order of the learned judge in allowing the plaintiffs claim against the first defendant.

THE MEMORANDUM OF APPEAL FOR B-02(NCVC)(W)-638–04 OF 2016

[20] The summary of the issues raised in the memorandum of appeal were as follows:

(a) the learned judge erred in law and fact when the learned judge has misdirected his mind to the principles enunciated in the two Federal Court cases, *Kamarulzaman Omar & Ors v Yakub Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 897 ('Kamarulzaman') and *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944 ('Samuel Naik');

(b) the learned judge erred in law and fact when the learned judge had failed to direct his mind to the fact that after the plaintiffs' claim against the first defendant was allowed, consequentially, the plaintiffs' claim against the fourth defendant too must be allowed;

(c) the learned judge erred and misdirected himself in law and fact when he failed to direct his mind to the fact that the presentations Nos 52709/2010, 52710/2010 and 52711/2010 all dated 27 May 2010 are defeasible under s 340(2) of the National Land Code ('the NLC') as

A the fourth defendant is the immediate holder and/or charger of the property;

(d) the learned judge had erred and misdirected himself in law and fact when he failed to direct his mind to the fact that the first defendant had no right to allow the fourth defendant to execute the instrument for the registration of the charge over the said property as the first defendant was only a 'bare trustee' of the said property, having sold the same to the deceased and received the full purchase price as stated in the first power of attorney dated 26 April 2002 which was registered in the High Court Kuala Lumpur on 30 April 2002 (Registration No 29503/02);

(e) the learned judge had erred and had misdirected his mind in law and fact when he failed to direct his mind to the fact that the first defendant had no right to charge the said property and/or the fourth defendant has no right to execute the registration of the charge in its favour, as the power to do was vested on the deceased as stipulated in cl 4 of the first power of attorney and/or the first plaintiff as stated in cl 3 of the second power of attorney dated 21 May 2002 and registered in the High Court of Kuala Lumpur on 19 July 2002 (Registration No 13192/02);

(f) the learned judge had erred and misdirected himself in law and in fact when he decided that the fourth defendant had no knowledge about the fraud committed by the first defendant when the issue of fides of the fourth defendant were not relevant to its defence;

(g) the learned judge had erred and misdirected his mind in law and in fact when the learned judge, despite having decided that the deceased and/or the plaintiffs were the beneficial owners of the property went on to direct the fourth respondent to proceed with the auction of the said property and be entitled to the proceeds, the remaining balance if any, to be paid to the plaintiffs;

(h) the learned judge had erred and had misdirected his mind in law and in fact when the learned judge failed to direct his mind to the fact that the instrument pertaining to the registration of the charge by the fourth defendant was void and of no effect; and

(i) the learned judge erred and had misdirected his mind in law and fact when he dismissed the plaintiffs' claim against the fourth defendant.

IN THE HIGH COURT

The plaintiffs' case

[21] Before the High Court, the following evidence was adduced through the first plaintiff ('SP2') and one, Bhadarul Baharain bin Sulaiman ('SP1'), the solicitor involved in the preparation and execution of the agreement, powers of attorney:

(a) the deceased had purchased the property from the first defendant on 22 December 1997 vide the agreement ('exh P1'). This was supported by the resolution of the board of directors of the first defendant ('exh D25') (at p 660 of Vol 2(3) of AR). The deceased had paid the full purchase price of RM2,133,651 ('exh P2'). However, before the property could be transferred to the deceased, the deceased passed away (exh P4 at p 296 of Vol 2(2) of AR). Before the deceased passed away, the deceased had executed the second power of attorney dated 21 May 2002 wherein the deceased has appointed the first plaintiff as 'substitute attorney' ('exh P3'). Both these powers of attorney had been duly registered in Kuala Lumpur High Court ('exhs P2 and P3');

(b) at the time the agreement was executed the individual grant of the property had not yet been issued by the land office;

(c) during the time the powers of attorney were executed, the said property had not been fully constructed. When the property was completed around 2004, the first plaintiff had requested the developer, Sunway Masalam Sdn Bhd to register the property in the name of the deceased but the developer refused and had registered the property in the name of the first defendant instead;

(d) on 9 December 2008, the first plaintiff managed to get the consent of the court to transfer the estate of the deceased, including the property in her name (exh P6 at pp 615–616 of Vol 2(3) of AR);

(e) the first, second and third defendants were fully aware that the first plaintiff was one of the administrators of the estate of the deceased. Further after exhs P1 and P2 were executed, the first to the third defendants were never involved in any of the transactions concerning the property;

(f) all payments of bills pertaining to quit rent and assessment were paid by the first plaintiff representing the estate of the deceased. All these receipts were in the name of the deceased (exh P13 at pp 610–614 and exh P14 at pp 617–624) of Vol 2(3) of AR);

(g) the first defendant agreed to transfer the said property in the name of the estate of the deceased, however they failed to do so and had fraudulently

charged the said property to the fourth defendant despite knowing that the said property belong to the deceased;

(h) the first defendant had charged the said property to the fourth defendant on 27 May 2010 as a security for financial facilities it obtained from the fourth defendant. The instruments for the purpose of the charge were executed by the second and third defendants on behalf of the first defendant without the consent of the first plaintiff as the administrator of the estate of the deceased. The first plaintiff had lodged police reports concerning this matter;

(i) SP1 was the solicitor involved with the preparation of the agreement ('exh P1'), the first power of attorney ('exh P2') and the second power of attorney ('exh P3'). According to SP1 both the first defendant and the deceased agreed that the purchase price had been paid in full. SP1 was also the solicitor who was involved with the registration of the first and second power of attorney; and

(j) there were elements of fraud involved which resulted in the registration of the charge instrument in favour of the fourth defendant. The fourth defendant was also negligent in not conducting a search with the proper authority to ascertain the status of the ownership of the property before or after registering the charge instruments.

Case for the first defendant's case

[22] Vide its witness, one Tee Siew Kai ('SD1'), the liquidator of first defendant, the first defendant stated as follows:

(a) SD1 was appointed as the liquidator of the first defendant vide an order of the Shah Alam High Court dated 10 December 2012. SD1 became aware of the plaintiff's claim only on 1 April 2013. He tried to contact the first defendant's directors, Teo Beng Hur and Narrimah bt Abdullah ('the second and third defendant') requesting them to hand over, amongst others, the statement of affairs, books and records relating to the first defendant in their possession but until the time he stood as the witness in court these defendants had not responded. Despite reminders having been sent there was no response from any of them;

(b) during SD1's examination of the affairs of the first defendant, SD1 discovered a director's resolution dated 26 April 2004 authorising the first defendant to enter the first power of attorney with the deceased with respect to the sale and purchase of the property together with unattested copy of the first alleged power of attorney signed by the second and third defendant. SD1 had also confirmed the existence of the agreement and

the two powers of attorney. From the documents SD1 obtained from the receiver and manager SD1 also sighted the agreement, first and second power of attorney;

(c) SD1 couldn't not verify the authenticity of the documents as he had no personal knowledge;

(d) SD1 could not retrieve any documents to prove the payment of the purchase price in the sum of RM213,363.10 and RM1,920,267.90 respectively, allegedly paid by the deceased to the first defendant. According to SD1, there was nothing to prove that the sale and purchase of the property had been concluded;

(e) SD1 confirmed that he did not send exh P2 for analysis by a handwriting expert to ascertain the authenticity of the document as well as the signatures contained in the document which were relied by the plaintiffs;

(f) SD1 testified that he had no personal knowledge pertaining to the agreement and all transactions involving the said property; and

(g) according to SD1, the first defendant is hopelessly insolvent and does not have any available cash. The first defendant will not be able to satisfy the judgment, in event judgment is awarded to the plaintiffs.

Case for the fourth defendant

[23] The fourth defendant through its manager, one Michael Khong Khai Tuck ('SD2') testified as follows:

(a) the fourth defendant had granted general banking facilities to the first defendant consisting of contract financing facility, overdraft facility and trade facility. A facility agreement was executed between the first defendant and the fourth defendant;

(b) the first defendant was required to provide security with respect of the banking facilities. There was a resolution of the directors of the first defendant dated 10 September 2009 which resolved that the first defendant shall create a first party charge over the property. As a result of that three charges were created by the first defendant in favour of the fourth defendant;

(c) before executing the charge instruments, the fourth defendant had conducted a proper search on the property and found that the first defendant was the registered owner of the property and the property was free from all encumbrances. However, the fourth defendant did not see it fit to visit and/or view the property;

(d) as the first defendant had breached the terms of financing agreement, the fourth defendant then terminated the financing agreement, withdrew all facilities granted to the first defendant and commenced proceedings to obtain an order for sale of the property from the Kuala Lumpur High Court; and

(e) at the time the first defendant applied for the financing facilities the fourth defendant had no information pertaining to the existence of the agreement between the first defendant and the deceased and/or the existence of the power of attorney executed by the deceased and the first defendant and the 'substitute attorney'. Neither was there any site visit made to the property.

The decision of the High Court

[24] The findings of the learned judge are as follows:

(a) the deceased is the owner of the property as the deceased had purchased the property and paid the full purchase price of the property to the first defendant. The evidence of the plaintiffs pertaining to the above was more probable as compared to the first defendant. The plaintiffs' evidence was supported by documentary evidence in the form of exh P2 which confirmed that the full purchase price had been paid to the first defendant;

(b) exh P2 was signed by the manager of the first defendant and witnessed by the plaintiffs' witness, SP1, an advocate and solicitor. Exhibit P2 was duly stamped in accordance with the applicable law. The first, second and third defendants had never disputed the signing of the document and/or claim that the same is false. The second and third defendants were not called by the first defendant to challenge the evidence of the plaintiffs;

(c) the burden is on the first defendant to secure the attendance of the second and third defendants as witnesses in court to prove their case;

(d) the first defendant had not taken steps to challenge the authenticity of the document by sending the same to the handwriting expert for verification. No police report was lodged by the first defendant. Only the second and third defendant would be in a position to challenge the plaintiffs' evidence. The learned judge had invoked the provision of s 114(g) of the Evidence Act 1950 against the first defendant;

(e) the first defendant could not prove its allegation that the deceased did not have the means to pay that huge sum of money to the first defendant. The first defendant could not counter the overwhelming evidence offered by the plaintiffs in the form the agreement and the first and second power of attorney;

(f) the fact that the first defendant is the immediate owner of the property was not disputed. The first defendant had bought the property when it was still under construction. The ownership can still be disputed and/or the title is defeasible if the elements mentioned under s 340(2) of the NLC existed;

(g) there were affirmative findings that the deceased was the lawful owner of the property. The first defendant knew from the outset that the purchase price had been paid in full to the first defendant. As such the first defendant was holding the property as a 'bare trustee' for the deceased and had no right to deal with the property;

(h) as the first power of attorney was an irrevocable power of attorney and for valuable consideration, all rights and interest in the property had been transferred to the deceased and subsequently by virtue of the second power of attorney the rights and obligations had been transferred by the deceased to the first plaintiff;

(i) the first defendant failed to produce evidence to show that the administrators of the estate of the deceased had given permission and/or mandate to first defendant to charge the property as a security for financial facilities granted to it by the fourth respondent;

(j) the property belong to the deceased and the first defendant was merely holding the property as a 'bare trustee' for the deceased. Therefore, the first, second and third defendants had no power and/or authority to charge the property to the fourth defendant as a security for the financing facilities the first defendant took from the fourth defendant;

(k) the fourth respondent was a bona fide party. There was no evidence to prove that the fourth defendant was negligent. Further it was disclosed during the trial that the approach taken by the plaintiff was that the first, second and third defendants had intentionally suppressed the information pertaining to exhs P1, P2 and D25 from the fourth defendant at the time the application for the facilities was made;

(l) the fourth defendant had taken all reasonable measures to verify the status of the property before the loan was approved. The search conducted by them proved that the first defendant was the owner of the property and the property was free from all encumbrances. Based on the aforesaid the plaintiffs had failed to prove that the charge was void and unenforceable; and

(m) the fact that the first defendant had breached the terms of the financing facilities was not disputed. The process undertaken by the fourth defendant in securing the order for sale is in order, the forfeiture of the property was in accordance with the law. Therefore, the fourth

A defendant has the right to proceed with the said auction, any amount remaining from the sale shall be paid to the plaintiffs.

OUR DECISION

B *The law*

[25] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

C **[26]** In the course of that, we had sought guidance from the very often quoted case of *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin* [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> D an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

E **[27]** Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision F or findings correctly on the basis of the relevant law and the established evidence.

The appeals before us

G Appeal No 803

[28] Having heard the evidence of the plaintiffs' witnesses and the evidence of SD1 as well as the documents that were tendered in court, the learned judge accepted the evidence of the plaintiff as being more probable as compared to H the evidence of SD1. The learned judge went on to rule that the plaintiffs had successfully proven that the purchase price for the said property had been fully settled by the deceased based on the evidence of the first plaintiff ('SP2') and the solicitor ('SP1') responsible for the preparation and execution exhs P1, P2 and P3 respectively. The evidence of the plaintiffs was further supported by exh I D5, the first defendant's circular resolution dated 26 April 2002 which authorised the second defendant to sign all documents pertaining to the power of attorney on behalf of the first defendant. The learned judge held that the deceased is the rightful owner of the property.

[29] The first defendant failed to challenge the evidence of the plaintiffs pertaining to the existence of exhs P1, P2 and P3 or D5, as SD1 had no documents with him. All documents relevant to the case are still in the possession of the second and third defendants who were not called as witnesses for the first defendant. Neither, SD1, the first defendant or the second and third defendant for that matter had taken steps to challenge the authenticity of exh P2. No police report was lodged and/or the documents sent for analysis to ascertain the authenticity of this document. Neither did SD1 verify with the second and third defendants if they had executed the same as they were the very persons who would be in the position to verify the authenticity of the document.

[30] We noted that SD1 was appointed as a liquidator for the first defendant only on 10 December 2012 vide an order of the Shah Alam Court dated 10 December 2012. SD1 testified that he became aware of the plaintiff's claim only on or about 1 April 2013. SD1 had also testified that he had no knowledge pertaining to exhs P1, P2 and P3 and other documents of the first defendant as the same are still in the possession of the second and third defendants who had refused to accede to SD1's request to provide the documents. We observe exhs P1, P2 and P3 were executed on 22 December 1997, 26 April 2002 and 30 April 2002 respectively. The terms of exh P2 are clear. Therefore, no evidence shall be given in proof of the terms of exh P2 except the document itself. When the terms of the agreement have been reduced to writing parties are bound by the terms of the agreement and the agreement could only be proved by the agreement itself (see s 91 of the Evidence Act 1950; *Tindok Besar Estate Sdn Bhd v Tinjar & Co* [1979] 2 MLJ 229; [1979] 1 LNS 119; *MBF Leasing Sdn Bhd v Eng Poh Hong* [2004] 6 CLJ 473).

[31] As SD1 has no personal knowledge pertaining to the facts surrounding the sale and purchase of the property and/or the execution of exh P2 and P3, having come to the scene many years after exhs P1, P2 and P3 were executed and had no documents with him, he would not be in the position to offer evidence to the contrary to disprove the plaintiffs' case.

[32] We are of the view that the learned judge had rightly invoked the provision of s 114(g) of the Evidence Act 1950 against the first defendant due to the non-calling of the second and third defendants in court as these defendants had personal knowledge of the matter and would be in a better position to provide the best evidence for the first defendant. The burden lies on the first defendant to call the second and third defendants to testify on its behalf. This finding is in line with the provision of s 103 of the Evidence Act 1950 (see *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105; [2004] 4 CLJ 282; *Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 4 MLJ 651; [2010] 6 CLJ 530).

[33] Based on the aforesaid, we found that the findings of the learned judge are predicated on the evidence that was presented before him. Hence we found no appealable error on the part of the learned judge that merit curial intervention.

Appeal No 603

[34] Turning now to the appeal filed by the plaintiffs against the decision of the learned judge to dismiss the plaintiffs' claim against the fourth defendant. It was the contention of the plaintiffs, once the claim of the plaintiffs against the first defendant is allowed, the plaintiffs' claim against the fourth defendant ought to be allowed.

[35] Having resolved that the first power of attorney is an irrevocable power of attorney and for valuable consideration and that the deceased is the rightful owner of the property, the next issue to be considered is whether the learned judge was right in dismissing the plaintiffs' claim against the fourth defendant. As shown above the fourth defendant is a financial institution which had provided the financial facilities to the first defendant with the property being pledged as a first party charge in favour of the fourth defendant.

[36] The fourth defendant argued that it had no knowledge about the claim. Based on its own search, the fourth defendant was satisfied, the first defendant is the registered owner of the property. The plaintiffs were not privy to the charge which only involved the first defendant and the fourth defendant.

[37] The next issue to be considered is whether for the purpose of s 340(2) of the NLC knowledge and fides of the fourth defendant are relevant.

[38] Section 340(2) of the NLC states that the title and interest of a person or body shall not be indefeasible:

(a) in event of fraud or misrepresentation where the person or body, or agent of the person or body was privy to; and

(b) in cases where the registration was secured by forgery, or by mean of an insufficient or void instrument.

[39] Subsection 340(3) of the NLC states that in cases where the title or interest of any person or body is not indefeasible due to the circumstances illustrated above, it shall be liable to be set aside in the hands of any person or body to whom it may be subsequently transferred.

[40] Learned counsel for the plaintiffs had stated in the memorandum of appeal that the learned judge had erred and misdirected himself in law and in fact when His Lordship had ignored the established principles enunciated in the Federal Court case of *Kamarulzaman Omar & Ors v Yakub Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 897 ('Kamarulzaman') and followed by *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944 ('Samuel Naik') which provide the trial courts the guide on how to deal with the situation when the challenge is made under s 340(2) as follows:

(a) firstly, the court must ascertain if the title or interest in dispute is registered in the name of an immediate purchaser or a subsequent purchaser; and

(b) in the event the title or interest is registered in the name of an immediate purchaser, the court will not 'offer a shield of indefeasibility'. The title is still liable to be set aside.

[41] Guided by the above high authorities against the factual matrix of the case at hand, we are satisfied that the fourth defendant is an immediate holder of the charge. Therefore, as illustrated above the fides of the fourth defendant are irrelevant.

[42] The plaintiffs argued as the learned judge had ruled that the deceased is the rightful owner of the property as he had paid the full purchase price, the first defendant is merely holding the said property as a 'bare trustee' to the deceased. In view of this, the learned judge ought to have made a finding that the plaintiffs' case against the fourth defendant ought to be allowed.

[43] We found merit in this argument. After having made the findings the full price for the said property had been paid, the first defendant stood in the position of a 'bare trustee' to the deceased. As a 'bare trustee', the first defendant could not deal with the property or treat as if the property belong to him. Further in this case an irrevocable power of attorney had been executed. Clause 4 of exh P2 states that the deceased had the sole right to deal with the property. In view of the aforesaid, the transaction entered into by the first defendant and the fourth defendant for the purpose of the financing facilities is void ab initio. Hence, the learned judge ought not to have dismissed the plaintiffs' case against the fourth defendant. Obviously, His Lordship's decision to dismiss the plaintiffs' claim and allow the fourth defendant to proceed with the order for sale of the property went against the principle enunciated in *Kamarulzaman* and *Samuel Naik*. From the cases cited herein a vendor who is a 'bare trustee' has no beneficial interest in the property. Therefore, the said vendor is not authorised by law to sell, transfer or deal with the property to the new purchaser or holder of my interest in the land. There is sufficient evidence before us that the first plaintiff had taken possession of the property and had

A been paying quit rents and assessment bills to the proper authorities (see para 20(f)) of this grounds of judgment).

[44] Learned counsel for the plaintiffs had referred us to the Supreme Court case of *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ
B 614; [1994] 3 CLJ 20 where it was held that 'When the full purchase price is paid, the vendor becomes a bare trustee for the purchaser'. In *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511; [1999] 2 CLJ 949 the Court of Appeal clarified that the word 'interest' used in
C s 340(2) of the NLC also applies to an interest in the form of a charge or a lease.

[45] Notwithstanding the fact that the plaintiffs in this case had not taken steps to lodge a caveat, it did not mean that the plaintiffs' rights and interest are vitiated, as in law a caveat does not create interest or rights (see *Samuel Naik*).

D

[46] We found, the learned judge erred and misdirected his mind as to the law and fact, when His Lordship ruled that the fourth defendant was a bona fide party and was not negligent in causing the charge over the property to be registered in its favour. There is clear and blatant disregard to the established
E principles enunciated in *Kamarulzaman* and *Samuel Naik* as discussed above.

CONCLUSION

[47] Having examined the pleadings, the notes of proceedings, and having
F heard the respective learned counsels, we found that with respect to Appeal No 803, the learned judge had sufficiently evaluated the evidence before His Lordship both testimonial and documentaries and had correctly allowed the plaintiffs' claim against the first defendant. We are satisfied there was no
G appealable error which merit our intervention.

[48] With respect to Appeal No 638, are as we have illustrated in the preceding paragraphs we found that the learned judge fell into error in failing to appreciate the principles of law enunciated in in *Kamarulzaman* and *Samuel*
H *Naik*. We were constrained to hold that the learned judge failed to judicially appreciate the evidence and/or the law presented before him so as to render his decision plainly wrong and upon curial scrutiny merit our appellate intervention.

I **[49]** Based on the aforesaid, we unanimously affirm the learned judge's decision which allowed the plaintiffs' claim against the first defendant with costs of RM15,000. With respect to the plaintiff's appeal against the decision of the learned judge which dismissed the plaintiff's claim against the fourth respondent, we allowed the plaintiffs' appeal with costs of RM15,000.

Accordingly, we set aside the order of the learned judge. We further order that the costs shall be subject to payment allocateur fees.

[50] We therefore ordered accordingly.

Ordering accordingly.

Reported by Afiq Mohamad Noor